COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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B-176203 January 16, 1973

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Mr. N. R. Breningstall
Chief, Accounting & Finance Division
Through Deputy Assistant Comptroller for
Accounting and Finance (AF/ACFA)
Headquarters United States Air Force
Washington, D. C. 20330

Dear Mr. Breningstall:

Further reference is made to your letter dated May 18, 1972, ACF, with attachments, forwarded to this Office by Headquarters United States Air Force letter dated June 9, 1972, requesting an advance decision concerning the claim of Mrs. Mildred C. Smith for refund of amounts of Federal income tax withheld for the years 1961 through 1966 from the retired pay of her deceased husband, Colonel James W. Smith, USAF, Retired. The request has been assigned number DO-AF-1161 by the Department of Defense Military Pay and Allowance Committee.

You indicate that Lieutenant Colonel James W. Smith was retired for years of service effective April 30, 1961, pursuant to 10 U.S.C. 8911 and advanced on the retired list to the grade of colonel pursuant to 10 U.S.C. 8963 with retired pay in the amount of 75 percent of basic pay computed under 10 U.S.C. 8991. On this basis his entire retired pay was taxable income and appropriate amounts were withheld by the Air Force and remitted to the Internal Revenue Service,

You also indicate that effective October 1, 1967, Colonel Smith waived part of his retired pay in favor of tax exempt Veterans Administration compensation. The amount of retired pay thus waived was $70 per month effective October 1, 1967, increased to $72 per month effective January 1, 1969, and to $75 per month effective July 1, 1970. Veterans Administration compensation was terminated effective August 30, 1970, by reason of the member's death on September 11, 1970.

The record shows that pursuant to the recommendations of the Air Force Board for the Correction of Military records and under the authority of 10 U.S.C. 1552, on April 2, 1970, Colonel Smith's military records were directed to be corrected to show that on April 30, 1961, he was unfit to perform the duties of his office by

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reason of physical disability; that he had a total combined compensable rating of 100 percent; that he was not retired by reason of years of service on April 30, 1961, but that on that date his name was placed on the Temporary Disability Retired List, with entitlement to disability retired pay effective May 1, 1961. It was also directed that Colonel Smith's records be further corrected to show that he was removed from the Temporary Disability Retired List on January 31, 1965, and placed on the Permanent Disability Retired List on January 31, 1965, with 20 percent disability.

You indicate that no change in the gross amount of retired pay to which Colonel Smith was entitled resulted from this change in his records. However, since pursuant to section 104(a)(4) of the Internal Revenue Code of 1954, 68A Stat. 30, as amended, 26 U.S.C. 104(a)(4), disability retired pay is not subject to Federal income tax, the taxable portion of Colonel Smith's retired pay was changed retroactively to May 1, 1961, by the correction action.

It appears that incident to the correction of Colonel Smith's records the Air Force furnished him a statement showing his taxable income as reported by the Air Force on Internal Revenue Service Form W-2 for each year from May 1, 1961, through December 31, 1969; the amount which should have been reported under the corrected records; and the amount of tax actually withheld from his retired pay for each year. The adjustment of taxable income and withholding for the year 1970 was made on the Form W-2 current for that year.

It is reported that claims for refund of taxes filed with the Internal Revenue Service by or on behalf of Colonel Smith in 1970 were paid for the years 1967, 1968 and 1969. Claims for the years 1961 through 1966 were denied by the Internal Revenue Service as barred by the applicable statute of limitations. See section 6511(a) of the Internal Revenue Code of 1954, 68A Stat. 808, as amended, 26 U.S.C. 6511(a).

Colonel Smith's widow, by her attorney, has now filed a claim with the Air Force for the amounts withheld for taxes by the Air Force during the years 1961 through 1966 stating in effect that such amounts should now be paid by the Air Force under authority of 10 U.S.C. 1552(c) inasmuch as the correction of Colonel Smith's records gave rise to the right to recover the taxes wrongfully withheld from his pay.

You indicate that in the past the Air Force and the other services have taken the position that such amounts originally correctly withheld as required by statute (sections 3402 - 3404, Internal Revenue Code of 1954, 68A Stat. 457, as amended, 26 U.S.C. 3402 - 3404) cannot be considered as amounts "found to be due the claimant" within the meaning of 10 U.S.C. 1552(c). You note, however, that in the case of Clyde A. Ray v. United States, Ct. Cl. No. 442-65, decided January 21, 1972, 453 F. 2d 754, involving facts essentially the same as those in Colonel Smith's case, the Court of Claims reached a contrary conclusion, finding the plaintiff entitled to judgment "based on the withholdings made from and applicable to what has been determined to be plaintiff's disability retired pay" for the years for which the Internal Revenue Service was without authority to allow refund.

You request our decision as to whether the Ray case may be followed in the settlement, under 10 U.S.C. 1552, of Colonel Smith's case and other similar cases. If the answer to that question is in the affirmative, you ask advice as to the procedure to be followed to insure that the amount paid by the Air Force does not duplicate any amount received by way of refund from the Internal Revenue Service for any tax year. And, you ask whether the Air Force may withhold the amount so payable from the next current disbursement to the Internal Revenue Service of amounts withheld for taxes. If such withholding from the Internal Revenue Service may not be made, you request advice as to how any such added expenditure to the member over and above his statutory entitlement should be accounted for.

Subsection 1552(a) of title 10, United States Code, provides generally that the Secretary of a military department acting through boards of civilians of the executive part of that military department may correct any military record of that department when he considers it necessary to correct an error or remove an injustice and, except when procured by fraud, such a correction is final and conclusive on all officers of the United States. Subsection 1552(c) provides in pertinent part as follows:

> "(c) The department concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be. * * *"

This Office has long held that a correction of records under 10 U.S.C. 1552 entitles the member whose records are corrected to all the benefits due him on the basis of the facts as shown by the corrected records, and his rights are determined in the same manner as if his original records had shown the information contained in the corrected records. See 32 Comp. Gen. 242 (1952), 34 Comp. Gen. 7 (1954), and 50 Comp. Gen. 718 (1971). The Court of Claims has also taken that view. See for example, Prince v. United States, 127 Ct. Cl. 612 (1954).

In Clyde A. Ray v. United States, supra, the court in effect held that the plaintiff's suit was not one for refund of taxes paid, but a suit to effectuate in full the administrative remedy allowed under 10 U.S.C. 1552, and that shelter of income from taxation is a "pencuniary benefit" flowing from the Correction Board's decision on the nature of his retirement. The court indicated that the plaintiff's claim arose as a result of the error of the Air Force in withholding amounts approximately equal to his supposed tax liability and thus it was not a claim for refund of taxes. All that had to be done was to determine the difference between the retirement pay the member received and the pay he would have received if the record had been correct from the beginning.

As you indicated, the amount awarded by the court in the Ray case was to be based on the withholdings made from and applicable to what was determined to be the plaintiff's disability retired pay for the years for which the Internal Revenue Service had refused tax refunds. The court said that "reliquidation of plaintiff's income tax liability for those years" would not be necessary unless the parties submitted stipulated figures on that basis, but the judgment is without prejudice to the defendant's rights, if any, to recover any tax windfall that may inure to the plaintiff.

The Government took the position in the Ray case, as indicated from our records, that allowances of tax refunds for prior years is within the sole province of the Internal Revenue Service. The Government's position appears to have been fully presented to the court. No further action was taken by the Department of Justice concerning the court's decision.

Accordingly, in the settlement of claims of the type here involved, we would have no objection to following the rule in the Ray case to the effect that claims for amounts withheld for income tax purposes will be treated as "pecuniary benefits" due the individual within the meaning of 10 U.S.C. 1552(c) rather than a claim for tax refund. However, claims for such amounts should be limited

to amounts withheld for income taxes in years for which the Internal Revenue Service is barred from making refunds by the applicable statute of limitations. Settlement of such claims may be paid from current appropriations available for payment of claims pursuant to 10 U.S.C. 1552(c) and accounted for as such. No interest may be allowed in any such settlements since 10 U.S.C. 1552 makes no provision for payment of interest.

To aid in the computation of amounts due, the claimant should be advised to furnish the necessary information and it would appear proper to request the advice of the Internal Revenue Service in preparing such computations.

Your question as to whether you may withhold amounts paid on such claims from your next current disbursement to the Internal Revenue Service is primarily a matter for determination by that agency and not within our jurisdiction. See sections 3402(a), 3403, 3404, 6301 and 6302 of the Internal Revenue Code of 1954, as amended. However, it would appear that to deduct such amounts from current disbursements to the Internal Revenue Service would be indirectly effecting a refund of taxes barred by the applicable statute of limitations and, therefore, illegal.

Your questions are answered accordingly and, if otherwise correct, payment may be made on such basis to Colonel Smith's widow on the voucher which is returned herewith.

Sincerely yours,

PAUL G. DEMBLING

For the Comptroller General
of the United States